Filed 6/22/09 P. v. Hinojos CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EFRIN RAMIREZ HINOJOS, Defendant and Appellant.	E046221 (Super.Ct.No. FVI700761) OPINION

APPEAL from the Superior Court of San Bernardino County. Margaret A. Powers, Judge. Affirmed as modified.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Pamela Ratner Sobeck and Jeffrey J. Koch, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Efrin Ramirez Hinojos guilty of second degree burglary (Pen. Code, § 459)[1] (count 1); forgery by signature (§ 470, subd. (a)) (count 2); forgery by passing (§ 470, subd. (d)) (count 3); and the unlawful use of personal identifying information (§ 530.5, subd. (a)) (count 4). The trial court thereafter found true that defendant had sustained two prior strike convictions. (§§ 667, subds. (b)-(i), 1170.12.) After the trial court denied defendant's motion to strike one or both of his prior strike convictions, defendant was sentenced to a total term of 25 years to life in state prison. On appeal, defendant contends (1) the trial court abused its discretion when it denied his motion to dismiss one or both of his prior strike convictions; (2) his concurrent sentences on counts 2 and 3 should have been stayed pursuant to section 654; (3) he was denied effective assistance of counsel when his counsel failed to object to the trial court's imposition of a $10,000 restitution fine; and (4) the trial court erred when it calculated his presentence conduct credits under the provision of section 2933.1. We agree that sentence on counts 2 and 3 should have been stayed and that defendant's custody credits should be modified. We reject defendant's remaining contentions.

I

FACTUAL BACKGROUND

In January 2007, defendant had a friend named William Cleland. Angela Pacheco worked as a bank teller at the Downey Savings in Victorville, and she knew defendant

[1] All future statutory references are to the Penal Code unless otherwise stated.

and Cleland. Christina Dykstra was homeless and living in her broken-down vehicle in Victorville and knew Cleland.

Angie Martinez had a checking account at Downey Savings in Victorville. In early 2007, Martinez discovered that $1,900 was missing from her account. She reported the loss to the bank, obtained paperwork pertaining to her account, and then reported the loss to the police. She did not authorize anyone to withdraw any money from her account, specifically $600 on December 29, 2006, and $1,300 on January 10, 2007. She did not sign the withdrawal slips used at the bank to obtain the money, nor did she authorize anyone to sign for her. The signatures used were not similar to her signature. Martinez did not know defendant, Cleland, or Dykstra.

A bank official showed Martinez photographs of two women taken on December 29, 2006, and January 10, 2007. Martinez did not recognize either one of them. The police eventually discovered Dykstra, Cleland, and defendant were involved in the incident.

A subsequent investigation revealed that on January 10, 2007, Cleland had called Dykstra and asked her if she wanted to make some money. Dykstra was interested, and Cleland told her he would tell her more about it when he picked her up later that day. Cleland and defendant drove to Dykstra's location and picked her up. When she got into the truck, Cleland initially told her they wanted her to serve some papers, then explained they wanted her to withdraw some money from Martinez's bank account. Defendant said that Martinez was his wife and gave Dykstra all the information about Martinez's name

and how to go into the bank, get a withdrawal slip, and fill it out. Dykstra expressed concern that she could not make the withdrawal because she did not have identification. Defendant told her not to worry because all she would need was Martinez's mother's maiden name, "Trejillo."

Cleland then drove to the Downey Savings in Victorville. Defendant told Dykstra to go into the bank and get a withdrawal slip, and she did so. She brought the slip back out to the car, and defendant showed her a slip of paper with an account number and Martinez's signature. He told her to copy this information on the withdrawal slip and write the amount of $1,300. Dykstra knew she was forging someone else's signature and knew it was wrong, but she was desperate for money and did it anyway.[2]

Dykstra went back into the Downey Savings; after waiting in line, she went to Pacheco's service window. Pacheco looked surprised and scared and told Dykstra she would have to get back in line and go to another teller. Dykstra did so without any questions. Dykstra then went up to another teller and was able to withdraw $1,300 from Martinez's account without any identification, but by giving Martinez's mother's maiden name.

Dykstra went back to Cleland's truck and gave the money to defendant. When Dykstra mentioned that she had first approached teller Pacheco and that Pacheco had

[2] Dykstra ultimately pled guilty to forgery and served 120 days in custody and work release. As part of her plea agreement, Dykstra promised to testify truthfully.

turned her away, defendant said that Pacheco was involved and knew what was going on. Defendant then gave Dykstra $50 and handed some money to Cleland.

Dykstra denied entering the bank on December 29, 2006, and withdrawing $600 from Martinez's bank account.

Defendant was eventually arrested. In April 2007, while in custody, he made several telephone calls from jail that were recorded. In these telephone calls, defendant made several remarks that could be interpreted as being inculpatory. The recordings of these telephone calls were played for the jury.

II

DISCUSSION

A. *Motion to Strike Priors*

Defendant argues the trial court abused its discretion by refusing to dismiss a second prior strike conviction pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. We disagree.

A trial court's decision whether or not to dismiss or strike a prior serious and/or violent felony conviction allegation under section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary

determination to impose a particular sentence will not be set aside on review.'" [Citation.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377, quoting *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978, quoting *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831 and *People v. Preyer* (1985) 164 Cal.App.3d 568, 573; see also *People v. Myers* (1999) 69 Cal.App.4th 305, 309.)

The California Supreme Court explained, "In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378, citing *People v. Langevin* (1984) 155 Cal.App.3d 520, 524 and *People v. Gillispie* (1997) 60 Cal.App.4th 429, 434.) Discretion is also abused when the trial court's decision to strike or not to strike a prior is not in conformity with the "spirit" of the law. (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*); *People v. Myers*, *supra*, 69 Cal.App.4th at p. 310.)

But "[i]t is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance. [Citation.]" (*People v. Myers, supra*, 69 Cal.App.4th at p. 310.) "Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*People v. Carmony, supra*, 33 Cal.4th at p. 378, quoting *People v. Strong* (2001) 87 Cal.App.4th 328, 338.)

The touchstone of the analysis must be "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams, supra*, 17 Cal.4th at p. 161; see also *People v. Garcia* (1999) 20 Cal.4th 490, 498-499.) A decision to dismiss a strike allegation based on its remoteness

in time is an abuse of discretion where the defendant has not led a life free of crime since the time of his conviction. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.)

Defendant contends the court should have granted his request to strike one or both of his prior strike convictions given his priors were committed over 20 years ago, he had lived a relatively crime-free life, he had been out of prison for over four years before he committed the instant offenses, and due to the nonserious or nonviolent nature of the present felonies.

We cannot conclude the trial court abused its discretion in declining to strike one or both of defendant's prior strike convictions. The relevant considerations supported the trial court's ruling, and there is nothing in the record to show that the court declined to exercise its discretion on improper reasons or that it failed to consider and balance the relevant factors, including defendant's personal and criminal background. In fact, the record clearly shows the court was aware of its discretion, aware of the applicable factors a court must consider in dismissing a prior strike, and appropriately applied the factors as outlined in *Williams*.

This case is far from extraordinary. Defendant has manifested a persistent inability to conform his conduct to the requirements of the law. Though defendant's current crime can be characterized as nonviolent, defendant does have a violent and serious prior record of criminal behavior. In 1978, he was convicted of theft in violation of section 484 and given 36 months of probation with 60 days in jail. In 1979, he was convicted of second degree burglary and again granted probation for 36 months, with 180

days in jail. In 1980, defendant was convicted under a plea deal of voluntary manslaughter (§ 192.1) for stabbing a man to death deal and sentenced to five years in state prison. In 1986, following parole, defendant was convicted of petty theft with a prior (§ 666) and again granted probation for 36 months, with 180 days in jail. However, defendant violated his probation and was sentenced to three years in state prison in 1987. He was paroled in April 1990 but violated his parole in June 1990, January 1995, June 1996, and April 1998 and was returned to prison each time. In 1985, 1986, and 1989, he committed several drug offenses, and in 1987, he was sent to state prison after being convicted of first degree burglary. In 1992 and 1999, defendant was convicted of petty theft with a prior and sentenced to state prison each time. Defendant was later paroled and discharged from parole and committed the instant serious offenses about four years later.

As defendant's criminal record indicates, since 1978, defendant has been in and out of prison, having committed numerous felony and misdemeanor offenses and having repeatedly violated probation and parole. In fact, defendant's criminal record shows that he has spent most of the last 30 years in the criminal justice system and continued to commit crimes and violate his parole and probation.

The court here could not overlook the fact defendant continued to commit serious criminal offenses and violate the terms and conditions of his probation and parole even after repeatedly serving time in prison. His conduct as a whole was a strong indication of unwillingness or inability to comply with the law. He has shown his continual disregard

for the law as evidenced by his continual parole and probation violations and criminal convictions. It is clear from the record that prior rehabilitative efforts have been unsuccessful for defendant. Indeed, defendant's prospects for the future look no better than the past, in light of defendant's record of prior offense and reoffense. All of these factors were relevant to the trial court's decision under *Romero*; there is no indication from the record here that the court failed to consider the relevant factors or that it failed to properly balance the relevant factors or that it abused its discretion in determining that, as a flagrant recidivist, defendant was not outside the spirit of the three strikes law. (*Williams, supra*, 17 Cal.4th at p. 161.)

Indeed, defendant appears to be "an exemplar of the 'revolving door' career criminal to whom the Three Strikes law is addressed." (*People v. Stone* (1999) 75 Cal.App.4th 707, 717.) Thus, given defendant's continuous criminal history, his numerous parole and probation violations, the seriousness of the past and present offenses, and his seemingly dim prospects for rehabilitation and lack of meaningful crime-free periods, we cannot say that the trial court abused its discretion when it declined to dismiss another one of defendant's prior strike convictions. The trial court's decision not to strike defendant's priors was neither irrational nor arbitrary.

In short, defendant was within the spirit of the three strikes law (see *Williams, supra*, 17 Cal.4th at p. 161), the trial court did not rule in an "arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice" (see *People v.*

Jordan (1986) 42 Cal.3d 308, 316), and we find no abuse of discretion (see *Romero*, *supra*, 13 Cal.4th at p. 504).

B. *Section 654*

At the sentencing hearing, the court found the burglary offense (count 1) to be a separate act from the two forgery convictions (counts 2 & 3). Accordingly, the court sentenced defendant to a 25-years-to-life term on the burglary conviction under the three strikes law and concurrent 25-years-to-life terms on the two forgery convictions. The court stayed defendant's sentence on the unlawful use of personal identifying information offense (count 4) pursuant to section 654.

Defendant argues the trial court erred by imposing the concurrent sentences on the two forgery convictions pursuant to section 654. He argues the burglary and forgery offenses were committed with the same intent and objective of obtaining money from Martinez's bank account through forged documents.

Section 654, subdivision (a) provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 precludes multiple punishments not only for a single act, but for an indivisible course of conduct. (*People v. Hester* (2000) 22 Cal.4th 290, 294; see also *People v. Centers* (1999) 73 Cal.App.4th 84, 98; *People v. Akins* (1997) 56 Cal.App.4th 331, 338-339; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) "The purpose of this statute is to prevent

multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime." (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) "The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them." (*People v. Hutchins, supra*, 90 Cal.App.4th at p. 1312.) The court's findings may be either express or implied from the court's ruling. (See *People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

People v. Curtin (1994) 22 Cal.App.4th 528 is instructive. In that case, the defendant entered a bank, presented a forged check and false identification, and cashed the check. (*Id*. at p. 530.) The defendant was convicted of forgery, grand theft, and burglary "all arising out of a single incident in which he cashed a check at a bank by misrepresenting himself as one of the bank's depositors and using a forged signature." (*Ibid.*) The defendant was sentenced to two years for burglary, a two-year concurrent term for forgery, and two years for theft. The trial court stayed only the theft sentence

under section 654. (*Curtin*, at p. 530.) On appeal, the defendant argued the forgery sentence should also be stayed, leaving punishment only for the burglary. The appellate court found it was appropriate to stay the defendant's conviction for forgery under section 654, because in that case the forgery and burglary were "part of the same indivisible transaction" and were "committed for a single criminal objective, to cash the check." (*Curtin*, at p. 532.)

Though defendant here planned and carried out a relatively sophisticated scheme in which he persuaded a homeless woman to withdraw money from Martinez's bank account by driving her to the bank and instructing her on how to withdraw the money, the forgery and burglary were "part of the same invisible transaction" and were "committed for a single criminal objective," to withdraw money from Martinez's bank account. It is apparent from the record that defendant's criminal intent and objective in committing the offenses were the same. There is no evidence in the record to suggest otherwise. In fact, the trial court, in sentencing defendant noted, " . . . I think the overall picture is it was all one transaction and all resulted in one receipt of money. It was only one account and the same victim." Accordingly, defendant's sentences for the forgery convictions (counts 2 & 3) should have been stayed pursuant to section 654.

C. *Ineffective Assistance of Counsel*

Defendant contends he was denied the effective assistance of counsel at the sentencing hearing when counsel failed to object to the imposition of the $10,000 restitution fine. He reasons that the sentences for the forgery convictions should have

been stayed pursuant to section 654, and counts stayed pursuant to section 654 should not be used to make the calculation of the restitution fine. (*People v. Le* (2006) 136 Cal.App.4th 925, 932-934 (*Le*).) He therefore contends the proper fine should have been only $5,000.

Under section 1202.4, subdivision (b), the trial court must impose a restitution fine for every person convicted of a crime unless it finds "compelling and extraordinary" reasons for not doing so. Such statute vests the court with broad discretion to set restitution fines in any amount between $200 and $10,000, "commensurate with the seriousness of the offense . . . ." (§ 1202.4, subd. (b)(1); see also *People v. Urbano* (2005) 128 Cal.App.4th 396, 405.) In doing so, the court is not required to hold a hearing or state its findings for the record unless it declines to impose the fine. (§ 1202.4, subds. (b) & (d); *People v. Dickerson* (2004) 122 Cal.App.4th 1374, 1379-1380.)

In determining the amount of the restitution fine, "the court shall consider any relevant factors including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime." (§ 1202.4, subd. (d).) Further, although not required to do so, the court may use the statutory formula of $200 "multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted" to calculate the amount of the fine.

(§ 1202.4, subd. (b)(2); see also *People v. Urbano*, *supra*, 128 Cal.App.4th at p. 406.) The court may not, however, include in the permissive formula any count for which sentence is stayed under section 654. (*Le*, *supra*, 136 Cal.App.4th at pp. 932-933.)

In *Le*, the appellate court held that the ban on multiple punishments under section 654 applies to restitution fines imposed under section 1202.4 because those fines are, in fact, a form of punishment. (*Le*, *supra*, 136 Cal.App.4th at p. 933.) "Thus, a restitution fine calculated under the formula provided by section 1202.4, subdivision (b)(2), constitutes a criminal penalty, not a civil remedy. [Citation.]" (*Ibid*.) The court concluded, "[W]e determine that the section 654 ban on multiple punishments is violated when the trial court considers a felony conviction for which the sentence should have been stayed pursuant to section 654 as part of the court's calculation of the restitution fine under the formula provided by section 1202.4, subdivision (b)(2). For that reason, the trial court erred in the present case to the extent the court used the felony conviction on the burglary count to calculate the amount of the restitution fine." (*Id*. at p. 934.)

Defendant argues that his counsel's failure to object to the court's calculation of the restitution fine constituted ineffective assistance. In other words, defendant assumes that the $10,000 restitution fine includes the forgery counts, which we have stayed.

"To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) 'counsel's performance fell below a standard of reasonable competence' and (2) 'prejudice resulted.' [Citations.]" (*Le*, *supra*, 136 Cal.App.4th at p. 935.) To show prejudice, the defendant must demonstrate "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

Unlike the situation in *Le*, on which defendant relies, that showed the court there used the optional statutory formula to determine the amount of the fine and improperly included a stayed count in its determination (*Le*, *supra*, 136 Cal.App.4th at pp. 932-933), the record here is silent as to the court's reasoning underlying its calculation of the restitution fines. Neither the court's statements imposing the fines or the probation officer's recommendation that $10,000 be imposed for the restitution fines reflects any reasons for selecting such amount. Unlike in *Le,* it is not apparent that the court was using the statutory formula. In the absence of any evidence showing the court used the statutory permissive formula and included the stayed counts to calculate the restitution fines under sections 1202.4 and 1202.45 in this case, we presume the trial court knew and applied the correct statutory and case law in ordering the respective restitution fines. (*People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Section 1202.4, subdivision (d) allows for the imposition of the restitution fine based on "any relevant factors." The imposition of a restitution fine in any amount is a discretionary sentencing choice. (*People v. Smith* (2001) 24 Cal.4th 849, 853.) The sentencing court has discretion to impose a fine of up to $10,000 in light of all relevant factors, including the seriousness and gravity of the offenses and the circumstances of its

commission. The court opined that defendant's crimes were serious and sophisticated. Defendant has simply not shown on this record that the trial court abused its discretion in setting the amounts of the restitution fines. Hence, he cannot show he was prejudiced by his trial counsel's failure to object. Unlike in *Le*, we cannot find "it is reasonably probable that the trial court would have imposed a smaller restitution fine (and thus a smaller corresponding parole revocation fine) if trial counsel had objected . . . to the trial court's . . . inclusion of the [conviction for which punishment was stayed] when the court calculated the restitution fine . . . ." (*Le*, *supra*, 136 Cal.App.4th at p. 935.)

D. *Custody Credits*

Defendant contends his sentence should be modified to reflect 528 days of custody credits because his credits were erroneously restricted to no more than 15 percent under section 2933.1. The People concede his custody credits should be modified.

At the sentencing hearing, the trial court first calculated defendant's presentence credits as 352 days actual time in custody, with 176 conduct credits. However, the court recalculated the custody credits pursuant to section 2933.1, and determined defendant was only entitled to 52 days of conduct credits, for a total of 404 days of custody credits. The abstract of judgment reflects that his custody credits were imposed and calculated under section 4019.

Section 2933.1, which restricts credits to no more than 15 percent for felonies listed in section 667.5, subdivision (c), applies only when the defendant's current conviction is a violent felony listed in section 667.5. (See *People v. Henson* (1997) 57

Cal.App.4th 1380, 1389.) Second degree burglary is not one of the enumerated offenses. (§ 667.5.) Thus, defendant's custody credits should have been calculated under section 4019, allowing six days to be deemed served for every four days spent in actual custody. (§ 4019, subd. (f).) The People concede that defendant is entitled to 528 days of custody credits (as originally calculated by the trial court). We will therefore order the abstract of judgment to be modified accordingly.

III

DISPOSITION

The trial court is directed to stay the sentence on the forgery counts (counts 2 & 3). The trial court is further ordered to award defendant a total of 528 days of custody credits and to prepare an amended abstract of judgment. The superior court clerk is directed to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
Acting P.J.

We concur:

GAUT
J.

KING
J.